

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WAL-MART STORES, INC., and CLC
ASSOCIATES,

Respondent,

v.

CLARK COUNTY,

Appellant,

RP NORTHWEST PROPERTIES and
FAIRGROUNDS NEIGHBORHOOD
ASSOCIATION,

Additional Parties.

No. 38241-5-II

ORDER CORRECTING CAPTION

The unpublished opinion for this appeal was filed on January 26, 2010. Due to an inadvertent error, the parties were incorrectly designated in the caption of the opinion. The caption of this court's opinion is corrected in this case to reflect that the respondent is WAL-MART STORES, INC., and CLC ASSOCIATES, and the appellant is CLARK COUNTY.

IT IS SO ORDERED.

DATED this _____ day of April, 2010.

Van Deren, C.J.

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UNPUBLISHED OPINION

Van Deren, C.J. — Wal-Mart Stores, Inc. and CLC Associates (collectively, Wal-Mart) argue that the Clark County Board of Commissioners (Board) violated the land use petition act (LUPA)¹ in reversing the hearings examiner’s decision conditionally approving a preliminary site plan. Clark County (County) seeks to uphold the Board’s decision.² We hold that the Board

¹ Chapter 36.70C RCW.

² Initially, the County appealed the superior court’s order reversing the Board’s determination that the hearings examiner’s decision was erroneous. Because LUPA places the burden of proof on the land use petitioner, we ordered the parties to submit briefs in accord with the statutory allocation of burdens on appeal. *See* former RCW 36.70C.130 (1995); *Pinecrest Homeowners Ass’n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004). Although the County appealed this case, we stand in the shoes of the superior court and Wal-Mart, as the

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erred by failing to follow the County's prescribed processes for reversing the hearings examiner. Therefore, we remand with instructions to reinstate the hearings examiner's decision, which specifies the issues that Wal-Mart must address before receiving final site plan approval.

FACTS

In August 2005, Wal-Mart sought approval from the County for the development of a Wal-Mart retail store at the 12.2 acre Salmon Creek Commercial Center site in unincorporated Clark County. The project site "is located south of NE 134th Street, north of NE 129th Street, and west of NE 27th Avenue." Admin. Record (AR) at 2432. The Water's Edge Condominium (Condominium) property is located near the northeast corner of the site. Wal-Mart accompanied its application for preliminary site plan approval with various supporting materials, including a preliminary stormwater design report and plan, a traffic study, and a request to modify the road. The County approved Wal-Mart's preliminary site plan.

The Fairgrounds Neighborhood Association (FNA) appealed the County's decision. FNA's appeal raised issues regarding the project's potential stormwater and traffic impacts.³ The hearings examiner issued a 48 page decision, or final order, conditionally approving Wal-Mart's preliminary site plan.

FNA appealed the hearings examiner's final order to the Board, raising issues of stormwater adequacy and traffic safety. The Board remanded the matter back to the hearings examiner to apply the proper evidentiary standard and for additional, specific factual findings.

LUPA petitioner, has the burden of proof before our court. *See Pinecrest Homeowners Ass'n*, 151 Wn.2d at 288. Therefore, after ordering supplemental briefing, we received Wal-Mart's opening brief of respondents, the County's responsive brief of appellant, and Wal-Mart's reply brief of respondents. The LUPA statute creates this confusing alignment of the parties.

³ The appeal also addressed additional issues not before us.

After considering additional briefing on remand, the hearings examiner issued a second final order conditionally approving the preliminary site plan. The decision provided extensive findings, decision, and conditions on all issues and approval criteria raised in the course of the application.

FNA appealed this final order to the Board. The three member Board adopted Resolution No. 2007-10-14, reversing the hearings examiner's final order, based on the stormwater and road modification issues:

Stormwater: The Examiner erred in approving a preliminary stormwater plan which proposed use of an existing stormwater line to which the Applicant failed to establish right of use. Although located within a public stormwater easement the Examiner found that such line was privately owned. Such finding is amply supported by substantial evidence in the record; the Examiner's conflicting finding that the Applicant has a right to use such line is not supported by substantial evidence in the record. Nor can this issue be remedied by an alternative conveyance system being substituted in a final stormwater plan given code limitations prohibiting substantial changes to a stormwater plan. See [former Clark County Code (CCC)] 40.380.060(C)(2)(h)(2) [(2004)];^[4] [former CCC] 40.380.060(F)(2) [(2004)].^[5] (Commissioners Morris and Stuart concur.)

⁴ For simplicity, we refer to the Clark County Code as "CCC" throughout this opinion, adopting the same characterization given by the parties, hearings examiner, and Board. Former CCC 40.380.060(C)(2)(h)(2) provides, in part: "To insure [*sic*] adequate public review and avoid multiple reviews of preliminary plans by county staff, the preliminary stormwater plan shall not be significantly modified after public notice of the final SEPA determination without issuance of a new SEPA determination."

⁵ Former CCC 40.380.060(F)(2) provides:

Final development plans shall be consistent with the preliminary stormwater plan. Final development plans may be combined with the final engineering plans. In addition to the information required of preliminary development plans, the following information is required:

- a. Delineate sub-basins and show sub-basin acreage used in hydraulic/hydrologic calculations both on-site and off-site that contribute surface runoff;
- b. Show directions and lengths of overland, pipe and channel flow;
- c. Indicated outfall points and overflow routes for the one hundred (100) year storm;
- d. Show storage volumes, pipe and weir invert elevations, and lengths

Road Modification: Given his findings regarding the unsafe traffic conditions along Rockwell Road, which findings are amply supported by substantial evidence in the record, the Examiner committed clear error in approving a road modification allowing placement of a nonconforming delivery-only driveway on such street which will exasperate [*sic*] already unsafe conditions. Such error is not cured by the condition imposed by the examiner requiring potential relocation of the driveway when traffic levels on Rockwell Road increase. (Commissioners Boldt, Morris and Stuart concur.)^[6]

Clerk's Papers (CP) at 51-53 (formatting omitted) (footnote added). The Board members unanimously agreed on the second ground only.

Wal-Mart filed its LUPA petition for review in the Cowlitz County⁷ superior court, seeking reversal of the Board's decision and reinstatement of the hearings examiner's final order. The trial court agreed, concluding that the Board's "land use decision is based on erroneous interpretations of law, clearly erroneous applications of the law to the facts, and is not supported by substantial evidence." CP at 239.

The County appeals.

of weir for stormwater control facilities; and

e. The director may require additional site or vicinity information if needed to determine the feasibility of the stormwater proposal.

⁶ The Board also stated a third ground for reversal: "Submittal requirements: The Examiner committed error of law in waiving a code requirement that certain engineering submittals be stamped by an engineer. (Commissioners Boldt and Stuart concur.)" Clerk's Papers at 53 (emphasis omitted). But Wal-Mart cured this problem before the hearings examiner's final decision, and the County cannot seriously contend that this ground constituted a sufficient explanation for reversing the hearings examiner.

⁷ A party may commence any action against a county in that county or in either of the two nearest judicial districts. RCW 36.01.050(1). Here, Cowlitz County borders Clark County to the north.

ANALYSIS

I. Standard of Review

LUPA governs judicial review of Washington land use decisions. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). We review the factual record before the Board and its decision, as it is the local jurisdiction's body with the highest level of authority to make a land use determination. *See* former RCW 36.70C.020(1) (1995); *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004); *HJS Dev., Inc.*, 148 Wn.2d at 468; *J.L. Storedahl & Sons, Inc. v. Cowlitz County*, 125 Wn. App. 1, 6, 103 P.3d 802 (2004). Because the Board did not make or reverse any of the findings of fact, the findings were binding on the Board and are verities on appeal. *See J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn. App. 920, 933, 180 P.3d 848, *review denied*, 164 Wn.2d 1031 (2008).

Wal-Mart, as the LUPA petitioner, continues to carry the burden of establishing that the Board erred under at least one of LUPA's six standards of review. *See Pinecrest Homeowners Ass'n.*, 151 Wn.2d at 288. These standards are:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
- (f) The land use decision violates the constitutional rights of the party seeking relief.

Former RCW 36.70C.130(1) (1995). Standard (a) presents a legal question that we review *de novo*. *Cingular Wireless, L.L.C. v. Thurston*

County, 131 Wn. App. 756, 768, 129 P.3d 300 (2006).

II. Failure to Follow Prescribed Processes

Wal-Mart argues that the Board failed to comply with the county code requirement that the Board issue adequate findings of fact when reversing or modifying a hearings examiner's decision. The County concedes that the Board issued no findings but claims that its conclusions nevertheless satisfied LUPA, which does not require findings. We agree with Wal-Mart.

Except for harmless error, we grant relief if the Board "engaged in unlawful procedure or failed to follow a prescribed process." Former RCW 36.70C.130(1)(a). Under former CCC 2.51.170 (1997), "[a] decision by the board to modify, reject or remand [the hearings examiner's decision] shall be supported by findings and conclusions." Furthermore, for Type III appellate decisions, as we have here:

If the board reverses or modifies an appealed decision, then the board shall adopt a final order that contains:

- (a) A statement of the applicable criteria and standards in this code and other applicable law relevant to the appeal;
- (b) A statement of the facts that the board finds show the appealed decision does not comply with applicable approval criteria or development standards;
- (c) The reasons for a conclusion to modify or reverse the decision; and
- (d) The decision to modify or reverse the decision and, if approved, any conditions of approval necessary to ensure the proposed development will comply with applicable criteria and standards.

Former CCC 40.510.030(H)(3)(b)(3) (2004).⁸

In reversing the hearings examiner on the stormwater and road provisions in the preliminary site plan, the Board did not state the relevant criteria, standards, or otherwise applicable law, as required under former CCC 40.510.030(H)(3)(b)(3)(a). While the Board cited

⁸ We note that this language is virtually identical to the later version of the code that Wal-Mart cited and provided to this court—CCC 40.510.030(I)(3)(b)(3).

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to two ordinances, it did so without explaining how they applied here. Nor did the Board specify facts that explained its decision, as it must under former CCC 2.51.170 and former CCC 40.510.030(H)(3)(b)(3).⁹

In sum, the Board's resolution reversing the hearings examiner consisted of bare conclusions about the evidence and assertions that the hearings examiner repeatedly erred. The Board's failure to properly explain its decision was not harmless because it significantly hampered our review. Therefore, we hold that the Board failed to follow its prescribed processes under former CCC 2.51.170 and former CCC 40.510.030(H)(3)(b)(3).

In *J.L. Storedahl & Sons, Inc.*, the same Board failed to follow the same prescribed processes for reversing a hearings examiner's decision. *See* 143 Wn. App. at 933. We reversed and remanded with instructions to reinstate the hearings examiner's decision and grant a rezone. *J.L. Storedahl & Sons, Inc.*, 143 Wn. App. at 933; *see also Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 804-05, 801 P.2d 985 (1990). In doing so, we did not address the remaining issues on appeal. *J.L. Storedahl & Sons, Inc.*, 143 Wn. App. at 933 n.6. We do the same here.¹⁰

⁹ The County also contends that any findings entered by an administrative body sitting in an appellate capacity are surplusage and thus unnecessary. *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992). Here, though, the Board's own rules specifically required that it carefully explain its decision by specifying the findings with which it disagreed. Former CCC 40.510.030(H)(3)(b)(3).

¹⁰ Both Wal-Mart and the County ask the panel to make legal determinations about Wal-Mart's ability to use the Condominium's stormwater line and its ability to build a driveway under the proposed plan. But this is an appeal from a preliminary stage of the approval process, so the factual record is not fully developed. Even if we were to address Wal-Mart's legal access to the stormwater line, the parties provided inadequate legal authority to support their arguments, in violation of RAP 10.3(a)(6). *See Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 84, 180 P.3d 874 (2008).

The County argues that even if findings were necessary, we should remand for the Board to enter additional findings. But here, the hearings examiner's decision already addressed the facts underlying Wal-Mart's application, and the Board chose not to disagree with their facts but merely reversed the hearings examiner's decision. It is not clear on the record before us whether Wal-Mart will be able to satisfactorily meet the hearings examiner's and the County's conditions to achieve final approval. Thus, the hearings examiner's decision provides the County with significant input and control over proper development within its jurisdiction.

We affirm the trial court and remand with instructions to reinstate the hearings examiner's decision and for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C. J.

We concur:

Houghton, J.

Quinn-Brintnall, J.